United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

75-2135

TO BE ARGUED BY: JON M. BEVILACQUA

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA ex rel :

JOEL TILLINGER, :

PETITIONER-APPELLANT, : DOCKET NUMBER

-against- : 76 Civil 2135

DISTRICT ATTORNEY, DADE COUNTY, FLORIDA, and WARDEN, QUEENS HOUSE OF DETENTION, N.Y., and DISTRICT ATTORNEY, QUEENS COUNTY, :

RESPONDENTS-APPELLEES. :

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BRIEF ON BEHALF OF RESPONDENTS-APPELLEES

B/P/S

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QUEENS COUNTY, NEW YORK

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Respondents-Appellees.	:	

BRIEF ON BEHALF OF

RESPONDENTS-APPELLEES

Statement of ORDER APPEALED FROM.

On September 9, 1975, the Honorable Henry Bramwell, of the United States District Court, Eastern District of New York, rendered a Memorandum and Order pursuant to petitioner's writ of habeas corpus permitting the State of Florida thirty days to extradite petitioner or, in the alternative, if no action was taken, ordering a hearing to determine whether the Florida action should be dismissed.

The Petitioner is appealing from Judge Bramwell's order granting the Florida authorities thirty days to extradite the petitioner-appellant.

FACTS

The petitioner was charged by the Florida authorities with a crime alleged to have been committed in April of 1971.

The petitioner had twice before been taken into custody pursuant to fugitive warrants issued by the State of Florida for the crime allegedly committed in April of 1971. The court below found that the petitioner had first been advised that Florida had charges filed against him while he was incarcerated in the Auburn Correction Center in June of 1973. The petitioner asserted in the court below that he advised the Florida authorities that he wished to dispose of the charges against him. The court below stated that Florida did not file its detainer warrant until after petitioner's parole in 1974, at which time the Queens County District Attorney, acting as agent for Florida, held petitioner for extradition. Florida failed to forward a governor's warrant to New York within ninety days. The petitioner was then released as provided by statute. Petitioner was then rearrested pursuant to a second fugitive warrant issued by Florida in February of 1975, and again, the warrant was dismissed after 90 days. Finally, on June 20, 1975, the petitioner was arrested on a Governor's warrant, which he sought to test before the court below.

On July 2, 1975, Judge Bramwell signed an order to show cause pursuant to petitioner's application for a writ of habeas corpus seeking his release on bail pending the determination of his motion to quash the governor's warrant. Chief Judge Jacob Mishler, on July 16, 1975, issued an order releasing the appellant on $5,000 bail but stayed said order until July 31, 1975, to give the Florida authorities an opportunity to proceed. On July 21, 1975 Judge Mishler modified his July 16, 1975 order and reduced bail to $1,000, with the consent of the respondent, Queens County District Attorney's Office, and permitted his immediate release upon posting of the bail.

On August 6, 1975, the Hon. Henry Bramwell issued an order to show cause directing the Florida authorities to show cause why the writ should not be issued. Thereafter, on August 21, 1975, an affidavit in aid of extradition was filed by John Lipinski, an assistant state attorney in Florida. On September 9, 1975, Judge Bramwell issued a Memorandum and Order which gave the Florida authorities thirty (30) days to extradite appellant. If Florida, at the end of this thirty day period, did not extradite the appellant then a hearing would be ordered by the court below to determine if the Florida action should be dismissed.

POINT

THE COURT BELOW PROPERLY GRANTED A THIRTY (30) DAY EXTENSION OF TIME FOR THE EXTRADITION OF THE PETITIONER. THE PETITIONER WAS AFFORDED DUE PROCESS OF LAW. (Answering Appellant's Point, brief pages 5-13).

The crux of the petitioner's claim in the court below is that he should be afforded an opportunity to challenge the Florida charges in a more convenient forum to him, i.e., federal district court within the Eastern District of New York (in the asylum state), rather than the State of Florida (demanding state), to avoid additional expense and inconvenience in commencing his defense of speedy trial.

Petitoner contends that the charges in Florida must be dismissed because of the failure of the Florida authorities to afford him a speedy trial. He further contends that the lower court's issuance of an order permitting an additional thirty day "grace" period for Florida to extradite appellant is highly prejudicial to appellant and thus denies him due process of law.

The court below, in affording the State of Florida an additional thirty day period of time to extradite appellant, did so based upon Braden v. 30th Judicial Circuit Court of

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The validity of the petitioner's conviction in the State of New York is not being contested here.

Kentucky, 410 U.S. 484 (1973) and United States ex rel Tucker v. Donovan, 321 F. 2d 114, 116 (1963).

The appellant states that his special circumstances are that he would be subjected to additional expense and inconvenience in commencing a defense in the State of Florida. Petitioner states that he would have to produce witnesses who are incarcerated in New York to testify to his efforts in demanding a speedy trial as far back as June 18, 1973.

The petitioner has not demonstrated any "special circumstances" under Braden, supra, or Exparte Royall 117 U.S. 241 (1886). These cases held in order to litigate a constitutional defense to a state criminal charge prior to a judgment of conviction by a state court, the petitioner must demonstrate special circumstances. Braden, supra at 489, citing Ex parte Royall, supra.

In Braden the Supreme Court listed the factors which comprise special circumstances. (1) Petitioner must exhaust his state remedies, see respondent's brief at pages 8-14. The petitioner in this case had clearly not exhausted his state remedies. (2) Petitioner in Braden made no attempt to abort state proceedings contrary to petitioner's position here that the court below should order an immediate hearing to determine whether Florida's charges should be dismissed. (3) The petitioner in Braden delayed his application for

habeas relief until the demanding state court's had conclusively determined that his prosecution was temporarily moribund. In this case, there is no showing that Florida's courts have even considered petitioner's claim. (4) The petitioner in Braden was facing the possibility that he would have to spend nine more years in the asylum state before litigating his constitutional defense in the demanding state. Braden, supra at 491. In the matter at bar, the petitioner was released from state prison when he was arrested on the detainer warrant unlike the petitioner in Braden, supra. The Supreme Court stated that:

> "A federal habeas corpus action" at this time and under these circumstances does not jeopardize any legitimate interest of federalism." Id. at 490-91.

The petitioner has submitted an affidavit from his main witness, one Jerome Rosenberg. There are no offers of proof as to what the other witnesses would testify to. Petitioner's application merely alleges a bare allegation that they can help the appellant establish a speedy trial defense. The appellant characterizes only Jerome Rosenberg as his main witness.

The appellant's reliance on the Braden case is misplaced. The facts in Braden are quite different from those in the matter at bar.

The petitioner in Braden, while incarcerated in the asylum, moved in federal district court in the demanding state for a writ of habeas corpus, alleging a speedy trial violation with regard to the demanding state's criminal charge. The Supreme Court in Braden held that a petitioner in this type of situation does not have to be physically present within the jurisdictional limits of the federal district court. The Supreme Court held that it is only necessary that the federal district court have jurisdiction over the respondent. The court held that the local district attorney acts as agent for the demanding state authorities. In the instant matter, the petitioner moved in the federal district court in the asylum state rather than the demanding state as in Braden, seeking to litigate the merits of his defense to the criminal charge in the demanding state. Moreover, the petitioner in Braden was not seeking to litigate the merits of his constitutional defense in federal court. He was just seeking enforcement of his speedy trial rights..

The appellant's application to the court below for a writ of habeas corpus under Title 28 USC §2241 (c) (3) and the Braden decision, is procedurally and substantively defective.

Procedural Defect

The appellant has not alleged to the court below or to this Court in his application for a writ of habeas corpus that he has exhausted his state remedies in the State of Florida.

In Sutherland v. Love, 359 F. Supp. 983 (1973) in a contested interstate detainer warrant situation, the court held that a habeas petitioner in an asylum state who applies for a writ of habeas corpus to a federal court within the asylum state should first apply for relief to the demanding state's courts, thereby exhausting his state remedies. After exhausting his remedies in the demanding state's courts, the petitioner can then apply to federal court in the demanding state for relief.

The petitioner's action in filling out the speedy trial request form as outlined in Mr. Rosenberg's affidavit cannot and should not be considered by this Court as satisfying the judicially crafted doctrine of exhaustion of state remedies, which is a prerequisite to the issuance of a writ of habeas corpus.

The appellant's offer of proof with regard to Mr. Rosenberg's affidavit is insufficient to establish the presumption of mailing and delivery of the speedy trial request by petitioner. Mr. Rosenberg merely says in his affidavit that he left the letter in the head clerk's office as he

usually does. He does not know what happened to the letter after that. Moreover, his affidavit is silent as to whether or not the envelope was addressed or postmarked, or to whom it was sent. The affidavit also does not state whether or not the letter was placed in the office receptacle for outgoing mail and picked up by the person responsible for mailing such letters. Accordingly, the petitioner has not been able to establish the presumption of mailing and delivery through Mr. Rosenberg's affidavit. It should also be noted that there is no affidavit from the petitioner attesting to any of the facts in Mr. Rosenberg's affidavit and there are no affidavits or offers of proof submitted by the petitioner as to what his other witnesses could say, just merely that they could help his defense.

Assuming, arguendo, that the appellant could establish the presumption of mailing and delivery, this presumption is rebutted by the affidavit of John Lipinski,Esq., an assistant state attorney in Dade County, Florida. Mr. Lipinski stated that he examined the Florida Circuit Court files, Eleventh Judicial Circuit, Dade County, for the petitioner (p. 28 of the petitioner's brief). He states these files did not contain a demand for speedy trial pursuant to the Florida Rules of Criminal Procedure.

In the Braden case the petitioner made repeated demands for a trial to the courts of the demanding state. In so doing, the Supreme Court held that the petitioner offered the courts of the demanding state an opportunity to consider, on the merits, his constitutional claim of the present denial of a speedy trial. The court found therefore, that he had exhausted all available state court remedies for the consideration of that constitutional claim, even though he had not yet been brought to trial by the demanding state.

The petitioner in the matter at bar may still allege his speedy trial claim in the State of Florida pursuant to Rule 3 191 (1) (3) of the Florida Rules of Criminal Procedure (see p. 29-30 of petitioner's brief). In Fay v. Noia, 372 U.S. 391 (1963), the Supreme Court held that Title 28 Section 2254, requiring a state prisoner to exhaust his state remedies as a prerequisite to federal habeas corpus relief, is limited in its application to a failure to exhaust his state remedies still open to the habeas applicant at the time he files his federal application. The Supreme Court reaffirmed this rule in Humphrey v. Cady, 405 U.S. 504, 516 (1972). Accordingly, the petitioner in the matter at bar should be barred from habeas corpus relief because of his failure to exhaust state remedies in Florida's courts which are still presently available to him.

Assuming arguendo that the petitioner had exhausted his state remedies in Florida, the respondents maintain the proper forum for the adjudication of his claim would be the federal district court in Florida. This Court could and should, if they find petitioner exhausted his state remedies in Florida, order a transference of the petitioner's claim under Title 28 USC §1404 (a), which provides for the 'transfer of any civil action to any other district or division where it might have been brought for the convenience of parties and witnesses in the interest of justice. Since habeas corpus proceedings are civil in nature, this provision, Title 28 USC §1404 (a) would apply. See United States ex rel Meadows v. State of New York, 426 F. 2d 1176 (1970) wherein this Court discussed the procedural device of transference.

Respondent maintains that it would be in the interest of justice and judicial economy to have this proceeding transferred de novo to the federal district court in Florida assuming this Court finds that petitioner has exhausted his state remedies in Florida. If this Court should find that petitioner has not exhausted his state remedies in Florida as respondents maintain, this Court should dismiss petitioner's proceeding in the court below. After the petitioner asserts his claim to the Florida courts, he can then apply to the federal district court in Florida. This procedure was discussed

and approved by the court in Sutherland v. Love, 359 F. Supp. 983 (1973).

Respondents in sum maintain that petitioner's action should be transferred to Florida because the Florida state court records and Dade County District Attorney's records are of course, located in that state. It would indeed be disruptive of the Florida Criminal Justice System for this Court to require that their court files and prosecutors files and proper official witnesses which are necessary to testify from these records, be transported to New York to determine if the petitioner's letter demanding a speedy trial had been received by them. This issue could properly be determined in a Florida state court if this Court finds, as respondents maintain, that he has not exhausted his state remedies in Florida. Of course, if this Court finds petitioner has exhausted his state remedies in Florida, the federal district court in Florida can very easily determine if the petitioner's demand for a speedy trial - had been received. This of course would not be disruptive for the Florida Criminal Justice System.

The Supreme Court has held with regard to the doctrine of exhaustion of remedies that the petitioner in a habeas corpus proceeding must show that the state courts have been fairly presented with the opportunity to rule on the questions raised by the petitioner in his federal petition. Picard v. Connor, 404 U.S. 270, 275 (1971). Courts have held

that, it is not necessary that state courts must have ruled on the merits of an issue before the question can be considered by the federal judiciary in a habeas corpus action. United States ex rel Meadows v. New York State, 426 F. 2d 1176 (2d Cir. 1970) cert. denied, 401 U.S. 941 (1971). The petitioner must also establish that the state courts at the present time will not pass upon the claim which he raises in federal court, United States ex rel. McBride v. Fay, 370 F. 2d 547 (2d Cir. 1966) and United States ex rel. Smith v. Follette, 405 F. 2d 1199 (1969).

Therefore, an inspection and production of the Florida court records of petitioner and the records of the Dade County District Attorney's Office can be handled much more expeditiously and with less disruption of Florida's Criminal Justice System if an action is commenced in Florida as opposed to New York.

The issue of whether or not the State of Florida received petitioner's letter demanding a speedy trial is a factual issue which has already been joined by the opposing affidavits of Mr. Rosenberg and John Lipinski, Esq., an

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Upon information and belief the source of which are my conversations with Joshua Sussman, an assistant district attorney in Queens County, who handled the petitioner's matter in state court and in federal district court. The petitioner attempted to raise the constitutional defense of speedy trial in Queens County, however, the state judge refused to entertain it. The petitioner did not attempt to appeal this action to the Appellate Division, Second Department.

assistant state attorney in Dade County, Florida.

Accordingly, the issue of speedy trial and receipt of the demand for a speedy trial should be litigated in Florida.

Substantive Defect

Respondents maintain firstly, that the petitioner is attempting to make Federal district court a forum for pre-trial motions from state courts.

Mr. Justice Brennan, in writing for the Supreme Court in Braden, stated at page 489:

> . . . . Petitioner does not, however, seek at this time to litigate a federal defense to a criminal charge, but only to demand enforcement of the Commonwealth's affirmative constitu- obligation to bring him promptly to trial. Smith v. Hooey, 393 U.S. 374.

The petitioner in the matter at bar, unlike the petitioner in Braden is seeking to litigate a federal defense to the state criminal charge in the lower court. Moreover, the petitioner in the matter at bar is not seeking to demand enforcement of the state's affirmative constitutional obligation to bring him promptly to trial. He is in effect seeking a dismissal of the Florida charges by attempting to litigate a constitutional defense in the court below. This

is totally inapposite to the situation in Braden, where the petitioner only sought a speedy trial in the demanding state.

This Court long ago in United States ex rel Tucker v. Donovan, supra, held that a court in the asylum state in extradition matters will limit its investigation in the habeas application to the circumstances surrounding the extradition.* This Court felt that the proper forum to contest the underlying charges is the court system within the demanding state (Florida in the matter at bar.**

Chief Judge Henley in Sutherland v. Love, supra, stated at page 987 that:

> It is well established that a person who has been arrested in an asylum state and ordered extradited to a demanding state cannot question by means of a habeas corpus proceeding in the former state the validity of his confinement or of the proceedings taken or to be taken against him in the latter state. Sweeney v. Woodall, 1952 344 U.S. 86; Dye v. Johnson, supra; Ex Parte Hawk, 1944, 321 U.S. 114; Watson v. Montgomery, 5 Cir. 1970, 431 F. 2d 1083; Arizona v. Hunt, 6 Cir., 1969, 408 F. 2d1086; Woods v. Cronvich, 5 Cir. 1968, 396 F. 2d 142; Brown v. Fogel, 4 Cir., 1967, 387 F. 2d 692; United States v. Flood, 2 Cir. 1967, 374 F. 2d 554; United States v. Donovan, 2 Cir., 1963, 321 F. 2d 114; Malory v. McGettrick, 6 Cir., 1963,

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* See also May v. Georgia, 409 F. 2d 203 (5th Cir. 1969).

** See also United States ex rel Meadows v. New York, 426 F. 2d 1176 (2d Cir. 1970).

318 F. 2d 816; Latham v. Reid, 1960, 108 U.S. App. D.C. 58, 280 F. 2d 66, Gallina v. Fraser, 2d Cir., 1960, 278 F. 2d 77; Johnson v. Matthews, 1950, 86 U.S. App. D.C. 376, 182 F. 2d 677.

Further, it should also be noted by this Court assuming that the court below had found a violation of the petitioner's speedy trial rights by Florida under the Braden decision, it could still properly allow Florida an additional period to extradite and if they did not extradite they could then dismiss the indictment.

Lastly, the petitioner complains that he has been picked up twice and detained for two ninety day periods before Florida finally issued a governor's warrant for his extradition. In People ex rel Keese v. Warden, Rikers Island Adolescent Detention Center ____ A.D. 2d ____, reported in N.Y.L.J. Feb. 20, 1976, at 9, col. 2., the Appellate Division, Second Department had discussed a situation where a petitioner had been incarcerated for one ninety day period (rather than two as in the matter at bar) before Florida finally issued a governor's warrant for the petitioner's arrest.

The court stated:

> Petitioner contends that his present detention is illegal because he was not arrested pursuant to a governor's warrant within an aggregate of ninety days of his original arrest (see People ex rel Bookhardt v. Warden, N.Y.L.J. Nov. 5, 1975, p. 8, col. 2). We cannot agree because, even though petitioner had been previously released, he remains a fugitive from justice within the meaning of the Federal Constitution and the statutes permitting extradition (see Glavin v. Warden, State Prison, 163 Conn. 394; cf. People ex rel Spence v. Sheriff, 44 A.D. 2d 867). Therefore, the application must be denied and the proceeding dismissed; petitioner fails to allege additional facts which might entitle him to relief.

Therefore, the court in effect held that once a fugitive always a fugitive.

Similarly, in People ex rel Spence v. Sheriff, etc. 44 A.D. 2d 867 (1974), the Appellate Division, Third Dept. stated at page 868:.

> Even conceding that petitioner was held illegally after his initial 30 days of confinement (Cf. CPL 570.36), in that his time of commitment was not properly extended (cf. CPL 570.40), immunity from extradition is not a remedy for such detention and the subsequent extradition proceeding was not

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* Braden v. 30th Judicial Circuit of Kentucky, supra; Smith Hooey, 393 U.S. 374, 383 (1969)(Harlan, J. concurring) May v. Georgia, supra; Yoo Kun WHA v. Sheriff, 436 F. 2d 966 (5th Cir. 1970)

thereby vitiated (People ex rel Green v. Nenna, , 53 Misc. 2d 525 aff'd 24 A.D. 2d 936, aff'd 17 N.Y. 2d 815).

Accordingly, for all the above stated reasons the order of the court below was proper and afforded the petitioner due process of law.

CONCLUSION

THE ORDER OF THE COURT BELOW SHOULD BE AFFIRMED.

Respectfully submitted,

NICHOLAS FERRARO
District Attorney
Queens County

Jon M. Bevilacqua
Assistant District Attorney
of Counsel

March, 1976

AFFIDAVIT OF SERVICE BY MAIL

State of New York)
:ss.:
County of Queens)

MARGARET DUFFEK being duly sworn, deposes and says that on the 18th day of March 1976 she served the within Respondents-appellees brief upon Joel Tillinger in the within action, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows: Weiswasser & Weiswasser
32 Court Street
Brooklyn, NY 11201

and by depositing the same in the post office box regularly maintained by the United States Government at 125-01 Queens Boulevard, Kew Gardens, New York 11415.

Deponent further says that the said Weiswasser & Weiswasser the attorney for the petitioner-appellant herein and that the address set forth on said wrapper is the office and post office address given by the said attorney upon the last paper served by them in the within action.

Sworn to before me this 18th day of March 19 76

GAYE GEFFEN
Notary Public, State of New York
No. 41-4[illegible]83 Qual. in Queens County
Certified in Queens County
Commission Expires March 30, 197[illegible]

Margaret Duffek

QDAO-1017-1/74